IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7635 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VITHALBHAI TALSIBHAI PARMAR VANKAR

Versus

STATE OF GUJARAT

Appearance:

MS SNEHA A JOSHI for Petitioner

MR UA TRIVEDI APP for Respondent No. 1

MR YOGESH S. LAKHANI for Respondent No. 2

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 04/10/2000

C.A.V. JUDGEMENT

1. Rule. Mr. U.A. Trivedi, learned APP appears and waives service of notice of rule on behalf of respondent No.1 State whereas Mr. Y.S. Lakhani, learned

advocate appears and waives service of notice of rule on behalf of respondent No.2.

2. By means of filing this petition under the provisions of Section 439 (2) of the Code of Criminal Procedure ('the Code' for short hereinafter), the petitioner, who is the original complainant, has prayed for cancellation of bail granted to respondent No.2 by learned Additional Sessions Judge, Mehsana vide order dated November 4, 1999 recorded in Criminal Misc. Application No. 47 of 1999.

3. The brief facts of the prosecution case, as per the FIR, are as under:

3.1. On May 2, 1999 at about 7 P.M. the petitioner's uncle Ranchhodbhai Dhanabhai had gone to fetch water from water tank which is situated in the field of Shantubhai Panabhai. Harshadbhai, son of said Shantubhai, abused Ranchhodbhai and thereafter Shantubhai and his son Harshadbhai gave blows with stick and also kicked him and inflicted fist blows to him. It is also alleged that thereafter said Ranchhodbhai returned to his Mohalla. It is further alleged that while the complainant along with others were sitting in the Mohalla, respondent No.2 along with others came there with deadly weapons like stick, pipe and dharia and again started quarrelling and gave threat to deceased Hargovanbhai, the brother of the complainant. Thereafter respondent No.2 gave pipe blows on the head of deceased Hargovanbhai and others also inflicted blows on him as well as on the complainant and other injured witnesses and as a result of the said injuries Hargovanbhai succumbed during treatment.

3.2. From the averments made in the petition it become obvious that C.R.No.I-67/99 is registered with Kheralu Police Station pursuant to the FIR lodged by Vithalbhai Tulsibhai Parmar against three persons including respondent No.2 for commission of the offences punishable under Sections 147, 148, 149, 302, 323, 504 and 506 (2) of the Indian Penal Code ('IPC' for short) and under Section 3 (1) (10) of Prevention of Atrocities Act ('the Act' for short)

4. I have heard Ms. Sneha Joshi, learned advocate for the petitioner, Mr. U.A. Trivedi, learned APP for respondent No.1 - State and Mr. Y.S. Lakhani, learned advocate for the respondent No.2. I have also considered the averments made in the petition and also perused the impugned order passed by the learned Additional Sessions Judge granting bail to respondent No.2 and the judgments

cited at the bar.

5. Ms. Joshi invited my attention to the following applications for bail preferred by the respondent No.2 for enlarging him on bail:

(1) Criminal Misc. Application No.13 of 1999 preferred by respondent No.2 before the learned Additional Sessions Judge, Mehsana for enlarging him on bail. The learned Additional Sessions Judge vide order dated May 13, 1999 refused to grant bail to respondent No.2. However, learned Additional Sessions Judge granted bail to other co-accused.

(2) After submission of charge sheet respondent No.2 preferred Criminal Misc. Application No.21 of 1999 which also came to be rejected by the same learned Additional Sessions Judge vide order dated July 2, 1999.

(3) Respondent No.2 thereafter approached this Court by filing Criminal Misc. Application No. 4015 of 1999 which also came to be rejected by this Court (Coram: A.K. Trivedi, J.) vide order dated July 12, 1999.

(4) Respondent No.2 preferred another Criminal Misc. Application No. 4993 of 1999 before this Court which was opposed by the petitioner by filing detailed reply affidavit. This Court (Coram: R.P. Dholakia, J.) after hearing the parties at length recorded the order on August 27, 1999 as under:

"Permitted to withdraw with a direction to the Sessions Court to expedite the trial and if possible to complete the same before the end of 1999."

(5) After lapse of three months from the date of the order recorded by this Court by which bail was refused to respondent No.2, he preferred Criminal Misc. Application No. 47 of 1999 before the learned Additional Sessions Judge, Mehsana for enlarging him on bail, which is granted by the impugned order.

Ms. Joshi contended that since all the previous applications for bail came to be rejected and as per the order recorded by this Court in Criminal Misc.

Application No. 4993 of 1999 by which order to expedite trial was passed, there was no business for the learned Additional Sessions Judge to consider the Criminal Misc. Application No. 47 of 1999 filed before him afresh as if the application for bail was moved for the first time and grant bail to respondent No.2. What was stressed by her was that notwithstanding the fact that there was no new material produced or change in circumstance pointed out before the learned Additional Sessions Judge he considered the application for bail afresh by appreciating the evidence from the police papers which was not permissible in law. Therefore, she contended that the order recorded by the learned Additional sessions Judge granting bail to respondent No.2 is capricious, arbitrary and in violation of the principles governing granting or refusing bail. She, therefore, requested to cancel the bail granted to respondent No.2.

6. Mr. Lakhani, learned advocate for respondent No.2 original accused opposed the petition by filing affidavit in reply sworn by respondent No.2 wherein, inter alia, it is contended that the application under section 439 (2) of the Code is not maintainable as revision application only can lie for challenging the observations made by the learned Additional Sessions Judge granting bail to respondent No.2. According to him, the petitioner ought to have filed Criminal Revision Application under Section 397 of the Code and not Criminal Misc. Application under Section 439 (2) of the Code. It was also contended that Criminal Misc. Application No. 47 of 1999 was not a successive application for bail. The learned Additional Sessions Judge has recorded the order in detail after appreciating the police papers and it was also emphasized by the learned advocate that similarly situated other co-accused have been released on bail and, therefore, on the ground of parity also respondent No.2 claimed bail and, therefore, he was released by the learned Additional Sessions Judge. He further contended that before the learned Additional Sessions Judge new ground with regard to receipt of the FSL report was canvassed and on the basis of the FSL report, the learned Additional Sessions Judge has considered the application for bail of the respondent No.2. It was lastly submitted that no untoward incident has taken place after the release of respondent No.2 on bail and that respondent No.2 has not misused the liberty granted by the learned Additional Sessions Judge after enlarging him on bail and there is no averment in the petition that he has committed breach of any of the conditions imposed on him by the learned Additional Sessions Judge after releasing him on bail.

He, therefore, prayed that the petition may be rejected as impugned order does not warrant any interference by this Court.

7. The first contention advanced by Mr. Lakhani that the petitioner ought to have filed Criminal Revision Application under Section 397 of the Code and not Misc. Criminal Application under Section 439 of the Code has no substance in view of the judgment of this Court in the case of Makwana Sambhubhai Chethabhai v. State of Gujarat, 1992 (2) GLR 1291. In the said case this Court has held that granting or refusing bail being an interlocutory order, revision would not lie. Applying the principle laid down in the above referred to judgment, it is obvious that order of granting bail being an interlocutory order, revision certainly would not lie and, therefore, it has to be held that revision would not lie even for cancellation of bail. In view of this, remedy for cancellation of bail would obviously fall under the provisions of section 439 (2) of the Code. Therefore, this petition is maintainable.

8. The next question falls for determination is as to whether on the facts and in the circumstances of the case bail application preferred by respondent No.2 before the learned Additional Sessions Judge was a successive bail application and if it was a successive bail application was it maintainable. The record of the case shows that respondent No.2, after his arrest, preferred Criminal Misc. Application No. 13 of 1999 before the learned Additional Sessions Judge which was rejected vide order dated May 13, 1999. After filing of the charge-sheet respondent No.2 preferred another application for bail being Criminal Misc. Application No. 21 of 1999 which also came to be rejected by the same learned Additional Sessions Judge vide order dated July 2, 1999. The third application for bail was moved by respondent No.2 being Criminal Misc. Application No. 4015 of 1999 before this Court and this Court (Coram: A.K. Trivedi, J.) rejected the said application vide order dated July 12, 1999. Fourth application for bail was preferred by respondent No.2 by filing Criminal Misc. Application No. 4993 of 1999 before this Court and this Court (Coram: R.P. Dholakia, J.) vide order dated August 27, 1999 permitted to withdraw the same with direction to the Sessions Court to expedite the trial and if possible to complete the same before the end of 1999. Notwithstanding the aforesaid four applications for bail came to be rejected the respondent No.2 again made application for bail being Criminal Misc. Application No.47 of 1999 before the learned Additional sessions

Judge, Mehsana and the learned Additional Sessions Judge before whom the said application for bail was proceeded has recorded the order granting bail to respondent No.2 on totally irrelevant and extraneous considerations.

9. On having perusal of the order passed by the learned Additional Sessions Judge and the averments made in the petition there is no manner of doubt that the petitioner has not mentioned about Criminal Misc. Applications No. 4015 of 1999 and 4993 of 1999 filed before this court by which the applications for bail were rejected by this Court. If the said fact was brought to the notice of the learned Additional Sessions Judge, he might not have ventured to entertain Criminal Misc. Application No. 47 of 1999 and examine the case on merits. Therefore, before the learned Additional Sessions Judge the respondent No.2 has concealed and suppressed the fact of filing of two applications for bail before this Court and the order of rejection recorded by this Court. On this ground alone the bail granted to the respondent No.2 is liable to be cancelled.

10. In the case of State of Maharashtra v. Captain Buddhikota Subha Rao, AIR 1989 SC 2292 the Apex Court has observed that when no substantial change in fact situation thereafter necessitating release of accused on bail, order granting bail thereafter by the High Court is illegal. In the said judgment the Supreme Court has observed that judicial discipline, propriety and comity demanded that the order granting bail should not have been passed reversing all earlier orders including the one rendered by the single Judge of the same High Court only a couple of days before, in the absence of any substantial change in the fact situation. In such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one Judge or selected another to secure an order which had hitherto eluded him.

11. In the case of Makwana Sambhubhai Chethabhai (supra) this Court has observed that if an application for bail made to the High Court is rejected, subsequent application for bail before the subordinate court is not maintainable.

12. In the case of Chandulal Harilal Lodhiya v. State of Gujarat, 1993 (1) GLR 596 this Court has held that bail granted by exercising discretion in favour of accused on totally irrelevant ground is liable to be

cancelled by the High Court.

13. Keeping in forefront the aforesaid settled principle laid down by the Supreme Court and this Court, now, again, reverting to the facts of the case, it clearly appears that the learned Additional Sessions Judge has ventured to entertain the petition by examining it afresh even by ignoring two previous orders recorded by him whereby bail was refused to the respondent No.2. The propriety requires that the learned Additional Sessions Judge should have refrained himself from entertaining the petition by examining it afresh. It is true that before the learned Additional Sessions Judge there was no mention about the two applications for bail moved before this Court by the respondent No.2 and the ultimate result of rejection of the same. But if learned Additional Sessions Judge had perused his earlier two orders then he would have noticed that no change in any circumstance is shown in the third application for bail which would have justified the order passed by him granting bail to respondent No.2.

14. In view of the above discussion, the order passed by learned Additional Sessions Judge releasing respondent No.2 on bail has got to be quashed and set aside.

15. For the foregoing reasons, the petition succeeds and accordingly is allowed. The impugned order dated November 2, 1999 passed by learned Additional Sessions Judge, Mehsana in Criminal Misc. Application No.47 of 1999 releasing the respondent No.2 Keshabhai Daljibhai Chaudhry on bail is quashed and set aside. Respondent No.2 shall surrender to judicial custody forthwith failing which the learned Additional Sessions Judge, Mehsana is directed to issue non-bailable warrant to take respondent No.2 into judicial custody. Rule is made absolute.

4.10.2000. (A.M.Kapadia, J.)

16. At this stage, Mr. Lakhani, learned advocate for respondent No.2, prays that the above order recorded by this Court may be kept in abeyance for a period of two weeks to enable respondent No.2 to move higher forum. Alternatively, he prays that respondent No.2 may be granted two weeks time to surrender to judicial custody as ordered by this Court.

17. Since this Court has cancelled the bail granted to respondent No.2 in view of the settled principles of law laid down by the Apex Court and on the facts and

circumstances emerging from the record of the case, the prayer made by respondent No.2 to keep the above order recorded by this Court in abeyance cannot be entertained and hence the prayer made by Mr. Lakhani is rejected. However, in the interest of justice, respondent No.2 is granted ten days' time to surrender himself to judicial custody failing which the learned Additional Sessions Judge, Mehsana is directed to issue non-bailable warrant to take respondent No.2 into judicial custody.

4.10.2000. (A.M. Kapadia, J.)